Supreme Court, U. S.
FILED
DEC 21 1977
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1977
No. 77-894

EDWIN PIERCE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RICHARD G. SHERMAN
Attorney at Law

6420 Wilshire Boulevard
Sixth Floor
Los Angeles, CA 90048
(213) 658-6800

Attorney for Petitioner

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1977
No. _____

EDWIN PIERCE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RICHARD G. SHERMAN
Attorney at Law

6420 Wilshire Boulevard
Sixth Floor
Los Angeles, CA 90048
(213) 658-6800

Attorney for Petitioner

TOPICAL INDEX

	Page
Table of Authorities	iii
CITATIONS TO OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL PROVISIONS	3
STATEMENT OF THE CASE	3
STATEMENT OF FACTS	6
REASONS FOR GRANTING THE WRIT	24
I. THE COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER A CONDITION OF PROBATION WHICH REQUIRES THE DISCLOSURE OF FINANCIAL ASSETS IS REASONABLY RELATED TO THE PURPOSE OF THE FEDERAL PROBATION ACT	24
II. THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER PROBATION CAN BE REVOKED BECAUSE A PETITIONER VALIDLY INVOKES HIS FIFTH AMENDMENT PRIVILEGE AGAINST SELF INCRIMINATION	36

		Page
III.	THE COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER THE PETITIONER'S REFUSAL TO DISCLOSE HIS FINANCIAL ASSETS AS A CONDITION OF PROBATION ON THE GROUND THAT SUCH DISCLOSURE MIGHT SUBJECT HIM TO CRIMINAL PROSECUTION ON OTHER CHARGES WAS A BLANKET REFUSAL TO TESTIFY AND THEREFORE A WAIVER OF THE FIFTH AMENDMENT PRIVILEGE.	41
CONCLUSION		51
APPENDIX A	Opinion Court of Appeals United States v. Pierce	
APPENDIX B	Order, U.S. Court of Appeals, Ninth Circuit FILED OCT 17 1977	

TABLE OF AUTHORITIES

Cases

	Page
Garrity v. New Jersey, 385 U.S. 493 (1967)	40
Griffin v. State of California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106	37
Hoffman v. United States,. 341 U.S. 479, (1951)	34-37 44, 50
Lefkowitz v. Turley, 414 U.S. 76, (1937)	38
Porth v. Templar, 453 F.2d 330 (10th Cir. 1971)	25
Spevack v. Klein, 385 U.S. 514 (1967)	36, 37
United States v. Bautista, 509 F.2d 675 (9th Cir. 1975)	45, 47
United States v. Consuelo-Gonzales 521 F.2d 259 (9th Cir. 1975)	26, 29
United States v. Gomez-Rojas, 507 F.2d 1213 (5th Cir. 1975)	45, 48
United States v. Malnick, 489 F.2d 682 (5th Cir. 1975)	45, 46
United States v. Pierce, 561 F.2d 742	23, 32, 34, 41
United States v. Theep, 502 F.2d 797 (9th Cir. 1974)	46-49

	Page
Statutes	
18 U.S.C. § 1623	7
18 U.S.C. § 1001	7
18 U.S.C. § 3651	28
Constitution	
United States Constitution Fifth Amendment, printed 1 U.S.C. XLVI	passim

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1977
No. _____

EDWIN PIERCE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review a judgment of the Ninth Circuit Court of Appeals entered in the above entitled case on August 22, 1977.

CITATIONS TO OPINIONS BELOW

The Judgement of the Court of Appeals is reported at 561 F.2d 735 (1977). Said Opinion is printed and

attached hereto and made a part hereof as Appendix A.

JURISDICTION

The Ninth Circuit Court of Appeals affirmed the conviction of petitioner on August 22, 1971.

All questions raised in this instant petition were raised in the Court below and on appeal to the Ninth Circuit Court of Appeals.

QUESTIONS PRESENTED

1. Whether a condition of probation requiring the disclosure of financial assets is reasonably related to the purpose of the Federal Probation Act.

2. Whether probation can be revoked because a petitioner validly invokes his Fifth Amendment privilege against self incrimination.

3. Whether the petitioner's refusal to disclose his financial assets as a condition of probation on the ground that such disclosure might subject him to criminal prosecution on other charges

was a blanket refusal to testify, and whether the Fifth Amendment privilege was therefore improperly raised.

CONSTITUTIONAL PROVISIONS

The Constitutional provision involved in the instant case is the Fifth Amendment to the United States Constitution, printed in 1 U.S.C. XLVI.

STATEMENT OF THE CASE

On October 11, 1972, the petitioner, Edwin Pierce, was indicted by Grand Jury in case number 11294 (C.T.1-28).[1/] The indictment charged thirteen counts of concealing property subject to tax assessment, eight counts of mail fraud, and one count of conspiracy to commit the above offenses.

The petitioner plead not guilty to the charges and moved to quash the assessments underlying the thirteen concealment counts on the basis that the assessments were made solely upon evidence obtained as the result of an illegal search and seizure. The District court held an evidentiary

---

1/ Reference to "C.T." is to the Clerk's Transcript.

hearing on the matter and granted the petitioner's motion (C.T. 29-39).

On July 26, 1973, the government filed a superseding indictment, as case number 12933 (C.T. 40-69), charging the petitioner with eight counts of mail fraud, fourteen counts of use of a manipulative device, and one count of conspiracy to commit those offenses.

Pursuant to a plea bargain, the petitioner thereafter pled guilty to the thirteen counts of concealing property subject to tax assessment of the original indictment, number 11294, and all other charges were dismissed (R.T. 3-4, 57).[2/]

The petitioner was sentenced to three (3) years imprisonment and fined Five Thousand Dollars ($5,000.00) on each count. The Court then suspended the term of incarceration and placed the petitioner on probation. The terms and conditions of probation included the provision that the defendant "testify under oath before a representative of the United States Attorney's Office for

---

2/ Reference to "R.T." is to the Reporter's Transcript.

the Central District on all questions as to his financial condition relating to amounts and locations of all assets and said testimony to be completed by March 1, 1974." (C.T. 70; R.T. 54-55). The petitioner and counsel both accepted the terms of the judgment (R.T. 56-57).

Pursuant to the probationary report of the District Court, the petitioner appeared before a representative of the United States Attorney on February 7, 1974, but did not comply with the probationary order on Fifth Amendment grounds (Deposition of Edwin Pierce). The matter was heard before the District Court and the fine was reinstated (R.T. 63-65).

The government then filed a Petition For Revocation of Probation based upon the petitioner's refusal to comply with the order. The petitioner explained that his refusal to testify was not in violation of the Court's probationary order (Supp. R.T. 5-15).[3/]

3/ Supp. R.T. throughout this brief has reference to Supplemental Reporter's Transcript.

The Court of Appeals for the Ninth Circuit affirmed the judgment of the District Court on August 22, 1977 (561 F.2d 735).

On September 6, 1977, the petitioner filed a Petition For Rehearing. On October 17, 1977, the Petition For Rehearing was denied. A copy of the order denying the Petition For Rehearing is attached hereto as Appendix B.

STATEMENT OF FACTS

At the time of sentencing, the District Court made clear that the only reason it imposed the disclosure condition was to have an aid in its ultimate determination of the amount of fine it would assess against the petitioner (R.T.55).

On February 7, 1974, the petitioner appeared, pursuant to the probationary order of the District Court, before a representative of the United States Attorney and was sworn to testify.

"MR. GREENBERG: This hearing is for the purpose of obtaining under oath a statement of the financial assets and to some extent history of the defendant in this case, Mr. Edwin Pierce.

"It is being conducted pursuant to a condition of probation imposed by Judge Warren J. Ferguson, and this statement is subject to the provisions of 18 U.S. Code § 1001 and 18 U.S. Code § 1623.

"Mr. Pierce or Mr. Sherman, do you have any questions about anything I have said thus far?

"MR. SHERMAN: I have some comments, Mr. Greenberg.

"MR. GREENBERG: No, just some questions about anything I have said so far.

"MR. SHERMAN: No, sir.

"MR. GREENBERG: About the applicability of the statutes?

"MR. SHERMAN: No, sir.

"MR. GREENBERG:

"Q. Mr. Pierce, do you understand what I have just said? Do you understand what it means?

"A. I don't understand the code sections.

"Q. All right. Very briefly let me state them"

Mr. Greenberg at that time explained the perjury statutes. The petitioner's assertion of his Fifth Amendment right was then set forth for the record by counsel, as follows:

"MR. GREENBERG: Now, Mr. Sherman, did you wish to make a statement?

"MR. SHERMAN: Yes, sir, I did.

"Mr.Greenberg, on January the 25th of 1974 I caused to be transmitted to you a letter, a copy of which was sent to the Clerk of the Honorable Warren J. Ferguson, and I would like to read that letter into the record.

"It says: 'Dear Stan:

"'With regard to your letter dated January 15, 1974, myself and Mr. Pierce will be at your office at the time and place designated therein. I do, however, have some serious misgivings about my position regarding the proposed deposition of Mr. Pierce for the following reasons:

"'1. His answers could incriminate him. For example, it could theoretically furnish concrete evidence of such things as Internal Revenue violations. (Emphasis supplied)

"'2. His answers could subject any life savings of Mr. Pierce to seizure pursuant still existing jeopardy assessment, and

"'3. The taking of his deposition is to me inconsistent with the terms of our plea bargain for reasons I will amplify should you so desire.

"'There are some decisions to be reached by all concerned relative to Mr. Pierce's deposition proceeding which we are going to have to resolve in the near future.

"'Very truly yours,

"'Richard G. Sherman'

"In that connection, Mr. Greenberg, what I meant when I said the taking of this deposition is inconsistent with the terms of our plea bargain, I am referring to the following things: Mr. Pierce pled guilty to certain income tax violations, namely the concealment of assets. His plea of not guilty remained as to all of the security and mail fraud violations, and in my mind he is not guilty of those charges.

"I respectfully submit that based upon the charges of which he was convicted, the taking of his deposition is just a bit unfair, and I don't want to represent to you that we ever bargained specifically

as to just what wouldn't happen. We never bargained specifically as to just what probationary order, if any, the Judge would make, and I don't think that was ever specifically stated, either between ourselves or to the Court. However, in all candor I will say that I told Mr. Pierce that based upon the crime that he was pleading guilty to or the series of crimes that he was pleading guilty to, the ambit of the appropriate punishment would in my judgment be so restricted. (Emphasis supplied)

"I submit to you that the taking of this deposition both for reasons 1 and 2 in the letter is entirely inappropriate, and I think it is also a bit out of line with the essence of our plea bargain. I do not believe at this point Mr. Pierce should go forward with the answer of any questions until we have a clarification of the Court's ruling by the Court. I would hope that these remarks could be transcribed and furnished to the Judge, and we can have a hearing on the matter.

"On behalf of Mr. Pierce and myself, if we have inconvenienced you with this, both of us, I think, are truly sorry, but we do consider these problems to be of a serious nature.

"MR. GREENBERG: Are you telling me that Mr.Pierce will not answer any questions?

"MR. SHERMAN: Yes, sir.

"MR. GREENBERG: All right. The only thing I want to address myself to, just so it is clear on the record so that this financial disclosure aspect was not a surprise, I just want to remind you that approximately, I don't recall the exact date now, approximately one month before the date that Mr. Pierce entered his plea, in a meeting in chambers with Judge Ferguson I discussed openly before you and Mr. Scott Spolin, Counsel for Mrs. Pierce, Mr.Pierce, and the Judge, and I think the Clerk, it was my intention to move in this general direction of financial disclosure. What I had in mind was restitution.

"As far as your views, I think that should be taken up with the Judge. The appropriate way for you to do it is by noticing a hearing of some kind. It is

my intention to have this transcribed, submitted to the Judge for such action as he deems appropriate.

"MR.SHERMAN: Well, Mr. Greenberg, let me state this to you, and I hope that both you and the Court will accept my representations.

"I was a bit taken aback when the sentence was imposed. I didn't anticipate it, and I am not trying to say that you didn't say what you said in chambers, although I think we were talking about some different type of offenses at that time. I had thought though, sir, that when Mr.Pierce entered a plea to these particular charges that he pled guilty to, that the ramifications would be far different than had he pled guilty to the security violations or been convicted.

"I understand and respect your position. I would like to point out to yourself and to the Court that the issues posed in numbers 1 and 2 of my letter also create rather substantial problems for me, and again I want to say that both Mr.Pierce and myself truly apologize for any inconvenience and/or misunderstanding. We

don't intend this to be an impertinent or contemptuous act on our part. We are not attempting to delay proceedings, but I am deeply troubled, Mr.Greenberg, and I feel I do need some guidance from the Court.

"MR. GREENBERG: Well, it strikes me as precisely an attempt at delay. You knew before you came here, you knew you weren't going to answer any questions, and you wanted guidance from the Court, why didn't you notice some sort of motion before the Court

"MR. SHERMAN: Well, I probably just wanted to come here, make these remarks so that we could get our positions set down fully, and I did advise you in the letter as to what my basic problem was. I still am very troubled, aside from everything else, with numbers 1 and 2 of my letter. There is the outstanding jeopardy assessment that would subject any assets of Mr.Pierce to seizure, and there is the possible question of self-incrimination. I never considered that at the time Judge Ferguson imposed the provisional sentence upon Mr. Pierce." (Deposition 5-9)

The matter was then set for hearing in the District Court, at which time counsel for petitioner stated for the benefit of the Court the rationale behind the refusal to answer. That rationale, as reflected in the colloquy in the record, was as follows:

"MR.SHERMAN: Your Honor, in this matter there are two basic problems that presented themselves to defense counsel. The first problem was the fact that Mr. Pierce's answer to the questions on his financial situation might be the basis of an income tax prosecution.
(Emphasis supplied)

"The second problem is that there is still an outstanding jeopardy assessment against Mr. Pierce. For Mr. Pierce to reveal if there are any substantial assets would subject those assets to a jeopardy assessment.

"Now, I might point out to your Honor -- and I think it's in some of the documentation that we were dealing with on the Motion for Suppression of Evidence -- one was called a Certificate of -- I think it was a Certificate of Assessment

and Payments; that is, they show what the assessment was and then they show what the payments were. I'm sure your Honor has that schedule. I think you will find that the Service has already taken, oh, probably somewhere between fifteen and thirty or $40,000 that they found in Mr.Pierce's assets. Now, I could be wrong on those figures but that's what my memory calls to mind." (R.T. 61-62).

"MR. SHERMAN: Your Honor, I don't want Mr. Pierce to be found in violation of probation for an activity and for reasons that I think basically arise as a result of counsel's judgment. If I did something like that, I don't know whether I could live with myself for the next months and although I think there should be proceedings in court, what I'm doing here, really, is requesting your Honor's guidance. In other words, we are in this position, your Honor; You could say -- there's not much question about it in my mind -- you could say 'Look, I told you to go ahead and give a statement and that's what I meant and you either give the statement or take the consequences.'

"Theoretically I suppose there could be some Fifth Amendment problem that I could raise and perhaps appeal, but your Honor made no agreement with counsel as to what sentence you would impose, you made no agreement with counsel as to what you would or wouldn't do. I just had my own speculations on it. I think I set that forth very clearly in here. I think Mr. Greenberg and I may have had a misunderstanding or two. I think that our position here, your Honor, the position that I would like to present to you, is one just based upon fairness.

"Mr. -- for example, Mr. Greenberg-- this will just take a minute. I don't want to take too much of your time -- for example, Mr. Greenberg talks about Mr. Pierce's gambling activities and stock manipulations but those aren't before the Court right now, really, and the only thing that is really before the Court is the violations to which Mr. Pierce had pled guilty and I thought that what was done probably was done as a result of Mr. Greenberg's eloquent

statement at the time of Mr. Pierce's sentencing but I don't think it was appropriate under the circumstances.

"THE COURT: Well, let's look at it realistically, too. I assessed a fine of $65,000. At the time I assessed the fine I said I would consider a Motion for Reduction of Sentence based upon the sworn testimony that he gives as to the value of his assets. As it stands now, I have to -- the fine is in full force and effect and he has to go to jail until he pays the fine or the fine is discharged. He has to under oath indicate the fact that he doesn't have a single asset. If he does have any assets and he signs that kind of paper, then, you know, he is in all kinds of difficulty. The difficulty is just going to pyramid and become enormous. That is the problem that Mr. Pierce faces.

"MR. SHERMAN: I understand that, your Honor, and I would like to address myself to it in this way: Your Honor knows I mean no impertinence by this statement. I certainly would not ever be impertinent. Your Honor, I just don't think the sentence your Honor gave was appropriate for the crime. I've tried to set forth those reasons.

"It would appear to me, your Honor that Mr.Greenberg started talking about Mr. Pierce's security violations and manipulations. He didn't plead guilty to that. He pled guilty to the nonpayment -- to the concealment of an asset that was under levy when the levy itself was illegal and unlawful. They've already taken substantial sums of money from him.

"Now, in considering that, if your Honor feels, you know, that the sentence was an appropriate sentence and a fair sentence, I would just like some sort of guidance. I mean this sincerely. I'm not trying to bait your Honor or ask your Honor silly questions. I really and truly don't know what to do, sir, because as Mr. Pierce answers a question -- and I can represent this to the Court -- I really don't know. Mr. Pierce has not told me what assets he has and where they are so I'm really as much in the dark as Mr. Greenberg, probably more so, because he might have some information that I don't have. <u>But you see, your Honor, if Mr. Pierce does have substantial assets, he's wide open to an income tax prosecution and he's wide open to having those</u>

<u>assets seized, your Honor, and that's my problem and I just would really like some help from the Court if you could give me some</u>." (R.T. 63-65) (Emphasis supplied)

Following that proceeding, the government then filed a Petition for Revocation of Probation based upon the refusal of the petitioner to testify under oath as set forth in the probationary order. The petitioner admitted that he would not disclose his financial assets pursuant to the probationary order (Supp. R.T.12). The rationale underlying that refusal to testify under oath was given by counsel as follows:

"MR. SHERMAN: Your Honor, if I may, sir, rather than reiterate everything I said, I would just like to rely on what I stated in that written document and reincorporate it again at this time as though it were set forth in full but just to highlight it.

"At the last hearing we talked about the fairness of the sentence that was imposed and your Honor seemed to indicate that you believed it was a fair sentence so I would just like to address

myself, if I may, to the Fifth Amendment problem. As I stated, I believe that Mr. Pierce would subject himself to a serious tax problem by giving the Government a starting point or perhaps even a finishing point to make a net-worth case. I also believe, your Honor, if Mr.Pierce were to reveal the location of any assets the Government would immediately levy upon and take those assets from Mr. Pierce because there is still outstanding a jeopardy assessment which your Honor determined to be invalid in connection with the criminal proceedings. (Emphasis supplied) That matter is currently pending before Judge Hill and his determination is awaiting a decision by the Ninth Circuit Court of Appeals in a related case, Janis v. the United States, in which briefs have been filed and oral argument has not as yet been held. In other words, it is submitted, your Honor, that Mr. Pierce is not in violation of the probationary order for the reasons set forth in the document."(Supp. R.T. 5-6) ". . . . Mr. Pierce's position is that he is not admitting that he violated the terms of his probation. His

position is that what he did was perfectly proper and lawful." (Supp. R.T. 8)

"MR. SHERMAN: Your Honor, I wonder if I made myself clear. It's Mr. Pierce's contention, of course, that he didn't violate the probationary order by his failure to make statements before Mr. Greenberg as previously directed by the Court. It is a fact, as stated in the petition, that he did refuse to answer questions and when taken in conjunction with the transcript, which your Honor has received into evidence, so to speak, it's our position that that does not constitute a violation of the Court's probationary order because it infringes upon the Constitutional rights of Mr. Pierce." (Supp. R.T. 12-13, Emphasis supplied).

The Court found the petitioner in violation of probation by reason of his refusal to testify. Probation was revoked and petitioner was sentenced to three years imprisonment (Supp. R.T. 15, C.T. 70)

On appeal, the petitioner contended that the condition of probation was invalid on its face and as applied in that it conflicts with the petitioner's Fifth Amendment privilege against self incrimination.

It its opinion affirming the judgment of the District Court, the Court of Appeals for the Ninth Circuit determined the following:

1. That the condition of probation, requiring the petitioner to reveal his financial assets, carries out the purpose of the Federal Probation Act: rehabilitation and protection of the public;

2. That the petitioner's objection on Fifth Amendment grounds was improperly raised because not made in response to specific questions by the Government; and

3. That the petitioner made a blanket refusal to answer any questions, which is an insufficient assertion of the privilege against self incrimination.

The Court concluded:

"Because Pierce, in his role as a witness, made a blanket refusal to answer any questions, we are unable to evaluate his Fifth Amendment claim. Therefore, we need proceed no further in determining the extent of Pierce's Fifth Amendment rights in the circumstances of this case.

"Pierce has failed to show that the condition infringed upon his constitutional rights. Nor has he provided any

other justification for his refusal to comply with the condition of probation. Thus we hold that the district Judge committed no error in revoking probation." United States v. Pierce, 561 F.2d at 742.

On September 6, 1977, petitioner filed a Petition for Rehearing before the Ninth Circuit Court of Appeals. The petitioner requested a rehearing on the grounds that he did not make a blanket refusal to testify, that the probation condition was not related to the purpose of probation, that he was entitled to assert the Fifth Amendment privilege, and that it was an improper ground for revoking probation.

The Petition for Rehearing was denied without opinion.

REASONS FOR GRANTING THE WRIT

I.

THE COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER A CONDITION OF PROBATION WHICH REQUIRES THE DISCLOSURE OF FINANCIAL ASSETS IS REASONABLY RELATED TO THE PURPOSE OF THE FEDERAL PROBATION ACT

The terms and conditions of probation in the case at bench included the provision here under question that the petitioner "testify under oath before a representative of the United States Attorney's office for the Central District on all questions as to his financial condition relating to amounts and locations of all assets and said testimony to be completed by March 1, 1974." A hearing for modification of fine was therefore set for March 29, 1974.

The Court explained that it "cannot see any need for probation supervision except approval of your residence and approval of your occupation. But [a] fine is warranted, a fine to be determined, however, by whatever your assets disclose." (R.T. 55)

The petitioner herein refused to disclose his assets pursuant to the probationary order, asserting his Fifth Amendment privilege to remain silent, on the ground that disclosure of his financial assets might be the basis of other prosecutions.

In Porth v. Templar, 453 F.2d 330, 333 (10th Cir. 1971), the Court stated:

> "The statute which authorizes the granting of probation (18 U.S.C. § 3651) provides inter alia that the judge having jurisdiction may suspend the imposition or execution of sentence when satisfied that the ends of justice and the best interests of the public as well as the defendant are served thereby, and may place the defendent on probation for such period on such terms and conditions that the court deems best. This section names specifically some of the conditions which may be imposed, including the payment of a fine, the making of restitution and support of persons for whom the accused is legally responsible. The

sentencing judge has a broad power to impose conditions designed to serve the accused and the community. The only limitation is that the conditions have a reasonable relationship to the treatment of the accused and the protection of the public. The object, of course, is to produce a law abiding citizen and at the same time to protect the public against continued criminal or antisocial behavior. This Court has said that the purpose of probation is to 'give the convicted person an opportunity to mend his ways and to so have his freedom under conditions, or at least to have such freedom after a short period of imprisonment.' Thomas v. United States, 327 F.2d 795, 797 (10th Cir. 1964)."

In United States v. Consuelo-Gonzales 521 F.2d 259, 264 (9th Cir.1975), the Court of Appeals for the Ninth Circuit determined that:

"The guiding principle which has emerged in construing the Probation Act is that the only permissible conditions are those that, when considered in context, can reasonably be said to contribute significantly both to the rehabilitation of the convicted person and to the protection of the public. Conditions that unquestionably restrict otherwise inviolable constitutional rights may properly be subject to special scrutiny to determine whether the limitation does in fact serve the dual objectives of rehabilitation and public safety. But this is not to say that there is any presumption, however weak, that such limitations are impermissible. Rather, it is necessary to recognize that when fundamental rights are curbed it must be done sensitively and with a keen appreciation that the infringement must serve the broad purpose of the Probation Act. This burden cannot be avoided by asserting

> either that the probationer has voluntarily waived his rights by not objecting in a proper manner to the conditions imposed upon him or that he must accept any condition the court 'deems best' as a consequence of being 'in custody.'"

18 U.S.C. § 3651 provides, in pertinent part, that the Court may place a defendant on probation "for such period and upon such terms and conditions as the court deems best." Yet, these cases qualify the Federal Probation Act by holding that a Court may not, in exercise of its discretion, impose conditions that have no reasonable relationship to the act, <u>particularly when such conditions, as applied, are in denegration of a fundamental right of the probationer</u>.

As the Fifth Amendment privilege against self incrimination is involved in this particular case, "special scrutiny" must be used to determine whether the condition requiring the petitioner to disclose his financial assets is directed toward a probationary goal.

In this particular case, the only enunciated reason for the probation condition was to enable the Court to determine what fine to assess (R.T. 55). Thus, it must be determined whether the enunciated reason serves a purpose of rehabilitation, whether it serves a purpose of protecting the public; and whether it unduly infringes upon the petitioner's constitutional rights. <u>United States v. Consuelo-Gonzalez, supra</u>.

The written probation condition was that the petitioner "testify under oath before a representative of the United States Attorney's Office . . . on all questions as to his financial condition relating to amounts and locations of all assets."

Basing its Opinion on these words alone, and not on the transcribed words of the District Court, the Ninth Circuit Court of Appeals rationalized the probation condition in its own way:

> "By acquiring information on Pierce's present assets, the court, acting through the probation department, developes a means of detecting illicit investment

activities that result in future increases in net worth. Carrying out a program of supervision in this manner is important both in terms of rehabilitation and protection of the public. The possibility of swift detection encourages the defendant to mend his ways. Hopefully this will lead to full rehabilitation."

In a footnote, the Ninth Circuit admitted that this interpretation was its own, and that it "assumed" this to be the purpose of the condition:

"It could be argued that the oral statements of the district judge at sentencing demonstrate that the court imposed the disclosure condition strictly as an aid to its ultimate determination of the fine to be assessed against Pierce. Although the comments of the sentencing judge with regard to a condition subsequently reduced to writing may be helpful in illuminating the purpose of the condition, it is often difficult

to ascertain with certainty the intent behind unrehearsed words. It is obvious that misstatements can be made. It is even possible that the sentencing judge may change his mind with regard to the reasons for a condition. For these reasons we appropriately place our primary reliance upon the written text of the condition. Nevertheless the comments of the sentencing judge in this case may properly be interpreted as indicating that the required disclosure had a purpose other than or in addition to the assessment of an appropriate fine He stated:

'I think the government is entitled to an examination under oath as to your assets. Beyond that, I cannot see any need for probation supervision except approval of your residence and approval of your occupation.

'A fine is warranted, a fine to be determined, however, by whatever your assets disclose.' (Emphasis added.)

> Presuming, as we may, that a judge follows the law, such an interpretation is appropriate."
> United States v. Pierce, 561 F.2d at 740, n. 3)

Thus, the Ninth Circuit apparently believes that a means to detect future illegal activities of the petitioner protects the public and is rehabilitative.

The petitioner respectfully disagrees. The Ninth Circuit's assumptions about the probationary purpose of the imposed condition are contradicted by the record. The sequence of events was as follows:

1. The District Court ordered that the maximum fine ($65,000) be imposed, and committed the petitioner to custody until the fine was paid. The commitment was stayed until March 29, 1974, when the petitioner was ordered to return to Court.

2. The District Court explained that it saw no need for probation supervision of the petitioner, except for approval of his residence and job; but that "[a] fine is warranted, a fine to be determined, however, by whatever your assets disclose."

3. The District Court explained that the petitioner had 120 days to move to modify the fine. An oral motion to modify the fine was made and accepted.

4. The petitioner appeared before the United States Attorney but refused to give a "statement of [his] financial assets" on the ground that his answers might incriminate him in violation of his Fifth Amendment privilege.

5. Probation was formally revoked and petitioner was committed to the custody of the Attorney General for three years. Execution of the sentence has been stayed pending these appeals.

Thus it is clear that the condition on its face is <u>not</u> directed toward any probationary goal. "The purpose of imposing the condition was not to rehabilitate Pierce, to help the probation department in supervising him, to shield him from future temptation or future wrongdoing, or to aid in an order of restitution. The condition was not imposed to aid law enforcement officers (police) in detecting or deterring future illegal conduct. The District Court explicitely and forthrightly explained that the aim was to provide the court with enough financial information to permit it to re-evaluate the appropriateness of the maximum fine provisionally imposed when Pierce moved

to modify the sentence, i.e., to reduce the fine." United States v. Pierce, supra, at 743, Hufstedler, Circuit Judge, dissenting.

Nor is the condition as applied related to any probationary goal.

At the time of the hearing to determine the petitioner's financial assets, the petitioner, through counsel, explained that the financial assets would not be disclosed because disclosure could subject him to other criminal prosecution.

The petitioner had been convicted of concealing property subject to tax assessment. The nature of the offenses charged make it clear that the petitioner hypothetically could very well be charged with other crimes of tax evasion by disclosure of his assets. "To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." Hoffman v.United States, 341 U.S. 479, 486-487 (1951). (Emphasis supplied)

The Court of Appeals for the Ninth Circuit refused to evaluate the Fifth Amendment objection on the ground that it was improperly raised.

The petitioner suggests that the nature of the proceedings, the nature of the past conviction and the nature of the requested disclosure reveal that a statement of financial assets might have a tendancy to incriminate the petitioner. Hoffman v. United States, supra, at 488. It surely might help the United States Attorney develop another prosecution against the petitioner. Beyond that, no goal -- let alone a probationary goal -- would be served other than to help the court assess a fine.

It is therefore respectfully requested that this court determine whether the probation condition of disclosure of financial assets serves a goal of the Federal Probation Act, on its face or as applied.

II.

THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER PROBATION CAN BE REVOKED BECAUSE A PETITIONER VALIDLY INVOKES HIS FIFTH AMENDMENT PRIVILEGE AGAINST SELF INCRIMINATION

It has been stated that the words "No person . . . shall be compelled in any criminal case to be a witness against himhimself" implies no exception. Spevack v. Klein, 385 U.S. 514, 516 (1967). It has also been stated that "[t]he immediate and potential evils of compulsory self-disclosure transcend any difficulties that the exercise of the privilege may impose on society in the detection and prosecution of crime." Hoffman v. United States, 341 U.S. 479, 490 (1951).

In this particular case, the District Court revoked probation because the petitioner asserted his Fifth Amendment right to remain silent. In Spevak v. Klein, supra, an attorney was disbarred because he asserted his Fifth Amendment privilege. In Hoffman v. United States, supra, a Grand Jury witness was convicted of criminal contempt for failure to answer questions based upon the Fifth Amendment

privilege. In none of these cases was the witness offered immunity from prosecution in return for the testimony. In all of these cases, the witnesses made an appropriate assertion of the privilege. In Spevak v. Klein, supra, and in Hoffman v. United States, supra, the Supreme Court held that it was improper for a Court to try to coerce the waiver of a constitutional guarantee by imposing a penalty for refusal to answer. "In this context 'penalty' is not restricted to fine or imprisonment. It means, as we said in Griffin v. State of California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106, the imposition of any sanction which makes assertion of the Fifth Amendment privilege 'costly.' Id., 380 U.S. at 614, 85 S.Ct. at 1233." Spevak v. Klein, supra, at 628.

The question before this Honorable Court is whether the same rule that has been held to apply in those cases applies to a person threatened with probation revocation, in the event of his refusal to answer questions that are a condition of probation.

"'The privilege is not ordinarily dependent upon the nature of the proceeding in which the testimony is sought or is to be used. It applies alike to civil and criminal proceedings, wherever the answer might tend to subject to criminal responsibility him who gives it. The privilege protects a mere witness as fully as it does one who is also a party defendant.'" Lefkowitz v. Turley, 414 U.S. 76, 77 (1973)

"'In McCarthy v. Arndstein, supra, the United States insisted that because of the strong public interest in marshaling and distributing assets of bankrupts, the Fifth Amendment should not protect a bankrupt during the official examinations mandated by the Bankruptcy Act. That position did not prevail. The bankrupt's testimony could be had, but only if he were afforded sufficient immunity to supplant the privilege. And long

before McCarthy v. Arndstein, the Court recognized that without the compelled testimony of knowledgeable and perhaps implicated witnesses, the enforcement of the transportation laws 'would become impossible,' but nevertheless proceeded on a basis that witnesses must be granted adequate immunity if their evidence was to be compelled. Brown v. Walker, 161 U.S., at 610, 16 S.Ct., at 651. Similarly, the enforcement of the antitrust laws against private corporations was at stake in Hale v. Henkel, supra, but immunity was essential to command the testimony of individual witnesses. Also, it would be difficult to overestimate the importance of the interest of the States in the enforcement of their ordinary criminal laws; but the price for incriminating answers from third-party witnesses is sufficient immunity to satisfy the imperatives of the Fifth Amendment privilege against compelled self-incrimination. Finally, in almost the very

context here involved, this Court has only recently held that employees of the State do not forfeit their constitutional privilege and that they may be compelled to respond to questions about the performance of their duties but not if their answers can be used against them in subsequent criminal prosecutions. Garity v. New Jersey, 385 U.S. 493, 87 S.Ct. 616 17 L.Ed.2d 1082 (1968); Uniformed Sanitation Men Assn., Inc., et al. v. Sanitation Comm'r., 392 U.S. 280, 88 S.Ct. 1917, 20 L.Ed.2d 1089 (1968)." Id. at 79.

The petitioner respectfully submits that the case before this Honorable Court is no different than the employment cases (e.g. Garrity v. New Jersey, 385 U.S. 493 (1967); Gardner v. Broderick, supra) or any other situation in which a citizen has been forced to choose between a constitutional privilege and his livelihood, or his freedom. The petitioner was given the choice between the assertion of a constitutional right and imprisonment for his

present conviction. Such was even recognized by the Court of Appeals, which stated: "As a practical matter a defendant's consent to a probation condition is likely to be nominal where consent is given only to avoid imprisonment." United States v. Pierce, 561 F.2d at 739.

It is respectfully requested that this Court grant Certiorari to determine whether probation can be revoked in response to the assertion of the Fifth Amendment privilege.

III.

THE COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER THE PETITIONER'S REFUSAL TO DISCLOSE HIS FINANCIAL ASSETS AS A CONDITION OF PROBATION ON THE GROUND THAT SUCH DISCLOSURE MIGHT SUBJECT HIM TO CRIMINAL PROSECUTION ON OTHER CHARGES WAS A BLANKET REFUSAL TO TESTIFY AND THEREFORE A WAIVER OF THE FIFTH AMENDMENT PRIVILEGE.

In its Opinion, the Court of Appeals for the Ninth Circuit stated that the petitioner made a blanket refusal to testify, "failing to show that the condition of probation infringed upon his constitutional rights." United States v. Pierce,

561 F.2d at 741-742. The Court seemed to imply that had the probation condition referred to acts unrelated to the present crime, it could not be imposed as a condition of probation (561 F.2d at 740, n.4). The Court, however, concluded that the petitioner failed to show that disclosure of financial assets might subject him to other criminal prosecutions.

The petitioner respectfully submits that this conclusion is not supported by the record. The petitioner appeared at the hearing. The government explained that the purpose of the hearing was to obtain the amounts and locations of all the petitioner's assets. Although not stated in the form of a question, this statement of purpose was clearly explained by the government. The petitioner asserted his Fifth Amendment privlege in response to that statement. Counsel stated on petitioner's behalf: "His answers could incriminate him. For example, it could theoretically furnish evidence of such things as Internal Revenue violations." (Deposition of Edwin Pierce).

At the subsequent Probation Revocation

Hearing petitioner's counsel asserted as follows:

1. "The first problem was the fact that Mr. Pierce's answer to the questions on his financial situation might be the basis of an income tax prosecution." (R.T. 61-62).

2. "But you see, your Honor, if Mr. Pierce does have substantial assets, he's wide open to an income tax prosecution and he's wide open to having those assets seized, your Honor, and that's my problem and I would really like some help from the Court if you could give me some." (Supp. R.T. 5-6)

3. "As I stated, I believe that Mr. Pierce would subject himself to a serious tax problem by giving the Government a starting point or perhaps even a finishing point to make a net-worth case." (Supp. R.T. 5-6)

From the nature of the conviction, the information sought and the assertions of the privilege, it should have been clear that disclosure of the appellant's financial assets might have led to an Internal Revenue prosecution. Any further explanation by counsel for the petitioner might

have subjected the petitioner to the very liability that he was seeking protection from.

> "[I]f the witness, upon interposing his claim, were required to be established in court, he would be compelled to surrender the very protection which the privilege is designed to guaratee. To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result. The trial judge in appraising the claim 'must be governed as much by his personal perceptions of the peculiarities of the case as by the facts actually in evidence.'" Hoffman v. United States, 341 U.S. 479, 486-487 (1951).

In Hoffman v. United States, supra, the appellant was convicted of criminal contempt for refusing to answer questions

asked during a grand jury investigation. The Supreme Court held that Hoffman could refuse to answer because his answer might provide a link in a chain of facts imperiling him with conviction of a federal offense. In so finding, it set forth the test court's use today in determining whether the privilege is properly claimed: "In this setting it was not 'perfectly clear, from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answer[s] cannot-possibly have such tendancy' to incriminate." (Emphasis in original).

In the circumstances of this case it was not "perfectly clear" that the petitioner's answers could not possibly have had a "tendancy to incriminate".

It was openly stated that disclosure might expose the petitioner to other crimes, such as tax evasion.

In its Opinion, the Ninth Circuit Court of Appeals cites United States v. Malnick, 489 F.2d 682 (5th Cir. 1974); United States v. Bautista, 509 F.2d 675 (9th Cir. 1975); United States v. Gomez-Rojas, 507 F.2d 1213 (5th Cir. 1975); and United States v. Theep, 502 F.2d 797

(9th Cir. 1974) for the proposition that by refusing to disclose his financial statements without answering the questions that the government intended to ask, the petitioner made a blanket refusal to testify. On the contrary, the petitioner stated the nature of his privilege and his reason for invoking the privilege only after the United States Attorney specifically told him exactly what his testimony would consist of: a statement of his financial assets. The appellant did not refuse to testify to anything at all, as did the witnesses in the above cited cases, or to testify about unspecified subjects, as did the witnesses in the above cited cases..

In United States v. Malnick, supra, a summons was issued by the Internal Revenue Service requiring him to give testimony for the investigation of his tax liability in past years. Manick's attorney conferred with the Assistant Regional Counsel for the Internal Revenue Service and it was mutually agreed that taxpayer Malnick would not appear at all, but would submit a written statement to the effect that Malnick "would have

asserted his appropriate constitutional privilege to all relevant and material questions propounded to him and to the production of such of the records therein enumerated in his possession." Id at 684. The Court held that such a refusal to answer any questions, without knowing the specific nature of the questions to be posed was a "blanket refusal to testify" and therefore unacceptable Id at 685.

In United States v. Bautista, 509 F.2d 675 (1975), an informant was subpoenaed to testify on behalf of the defendant. The witness told the defendant that he would refuse to testify on Fifth Amendment grounds. The United States Attorney was informed of this fact early in the trial. The Court refused to grant the witness immunity from prosecution. As a result, the defendant did not call the informant to the witness stand, although he was physically available to attend. Thus, the Court was unable to pass on the Fifth Amendment claim. In the instant case, however, the petitioner did appear at the deposition, and his Fifth Amendment claim was asserted in response to the specific information he was there called upon to relate.

In United States v. Gomez-Rojas, 507 F.2d 1213 (5th Cir. 1975), the defendants, alleging that they were entrapped, sought to call a witness in their behalf. On the day trial began, the witness told the District Court, outside the presence of the jury, that he would assert his Fifth Amendment privilege. The District Court dismissed the witness without further inquiry. The Court stated that a simple blanket declaration by the witness that he could not testify for fear of self incrimination would not suffice to invoke the privilege. In the instant case, however, the petitioner was called to state specific facts: his financial assets. He knew the nature of the questions - there was no second guessing. Furthermore, he told the Court exactly why he was asserting the privilege: because disclosure of his financial assets might subject him to other criminal prosecutions for failure to disclose information to the Internal Revenue Service. It is clear that while Gomez-Rojas may have constituted a "blanket refusal", the petitioner's failure to testify clearly did not.

In United States v. Theep, 502 F.2d 797 (9th Cir. 1974), the Internal Revenue

Service issued summonses in connection with an investigation of tax payers' returns. The taxpayers appeared at the appropriate time but refused to testify, claiming their right against self incrimination under the Fifth Amendment. The Court on appeal held that the taxpayers could not avoid the summonses by a blanket claim of privilege. In the case at bench, the petitioner appeared at the deposition and refused to testify, but the circumstances of his refusal are clearly distinguishable from that of the appellants in Theep.

Here, the petitioner was ordered to disclose his assets as a condition of probation, so that the Court could determine what fine to impose. The petitioner asserted the privilege with regard to disclosure of his assets because his financial information possibly would have disclosed that he was involved in proscribed activity other than that for which he was sentenced to probation.

In Theep, however, the appellant refused to testify, not knowing what he would be asked, because of the possibility that the information sought would lead to the very conviction sought by the Government.

Thus, it is clear that the petitioner did not make a "blanket" refusal to testify, and that he did, in fact, disclose his reasons as much as was possible to show that the requested answers "might have a tendancy to incriminate him."

"The privilege afforded not only extends to answers that would in themselves support a conviction under a federal criminal statute but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the [petitioner] for a federal crime." Hoffman v. United States, supra, at 486. (Emphasis supplied.)

It would be in the public interest for the Court to set at rest the above uncertainties in the law as to the manner in which the privilege against self incrimination must be raised.

CONCLUSION

WHEREFORE, for all of the reasons and upon all of the considerations set forth above, the petitioner respectfully prays that a Writ of Certiorari issue in the within case to review the decision of the Court of Appeals below.

Respectfuly submitted,

RICHARD G. SHERMAN
Attorney for Petitioner
Pierce

APPENDIX A

9. Criminal Law ⇐273.4(1)

Although a defendant who pleads guilty may raise a Fifth Amendment right with respect to transactions constituting the crime if he is subject to further liability for such transaction, burden is on defendant to raise any Fifth Amendment claim he may have with regard to a risk of further prosecution. U.S.C.A.Const. Amend. 5.

10. Criminal Law ⇐982.5(1)

Sentencing judge must formulate conditions of probation to avoid the risk of compelled self-incrimination; however, where defendant has pled guilty, the judge may impose a condition requiring the release of information concerning that crime unless defendant raises a Fifth Amendment claim that disclosure could lead to further prosecution. 18 U.S.C.A. § 3651; U.S.C.A. Const. Amend. 5.

11. Criminal Law ⇐982.6(5)

Failure to object at sentencing that a probationary condition requiring release of information concerning the crime does not effect a waiver of Fifth Amendment rights; even if the condition as imposed is valid on its face, based on information presented to the sentencing judge, the defendant may still raise his Fifth Amendment claim in response to questions asked pursuant to the condition. 18 U.S.C.A. § 3651; U.S.C.A. Const. Amend. 5.

12. Criminal Law ⇐393(1)

Although there is no waiver if, at sentencing proceeding, defendant fails to assert a Fifth Amendment claim to probationary condition requiring him to release information concerning the crime, a failure to raise the claim in response to questions asked pursuant to the condition will result in a waiver. 18 U.S.C.A. § 3651; U.S.C.A. Const. Amend. 5.

13. Criminal Law ⇐393(1), 982.9(1)

When asked to produce information within scope of a probationary condition that defendant release information concerning the crime, a defendant must either comply or provide justification for failing to do so; if he refuses to assert his Fifth Amendment right and yet refuses to answer questions, the right is lost and where such occurs, probation may properly be revoked, notwithstanding subsequent statements that defendant had a Fifth Amendment right which he failed to assert. 18 U.S.C.A. § 3651; U.S.C.A.Const. Amend. 5.

14. Criminal Law ⇐393(1)

Fifth Amendment claim must be raised in response to specific questions propounded by the investigating body; such requirement permits a reviewing court to determine whether a responsive answer might lead to injurious disclosure; a blanket refusal to answer any question is unacceptable. U.S.C.A.Const. Amend. 5.

15. Criminal Law ⇐982.9(1)

Where at proceeding held pursuant to probationary condition that defendant, who pled guilty to concealing property subject to a tax assessment, reveal information as to his financial condition the defendant stated that he would not answer any questions, there was no error in revoking probation. 18 U.S.C.A. § 3651; U.S.C.A.Const. Amend. 5; 26 U.S.C.A. (I.R.C.1954) § 7206(4).

Richard G. Sherman, Los Angeles, Cal., submitted on briefs for defendant-appellant.

William D. Keller, U. S. Atty., Earl E. Boyd, Asst. U. S. Atty., Los Angeles, Cal., for plaintiff-appellee.

Appeal from the United States District Court for the Central District of California.

Before HUFSTEDLER and WALLACE, Circuit Judges, and FREY,* District Judge.

WALLACE, Circuit Judge:

Pierce failed to comply with a condition of probation requiring him to reveal certain financial information. Probation was re-

* Honorable William C. Frey, United States District Judge, District of Arizona, sitting by designation.

voked and Pierce appeals, contending that the condition was violative of the Fifth Amendment and thus invalid. We affirm.

I

In 1965 the Internal Revenue Service assessed a $248,429.80 wagering excise tax against Pierce. In response, Pierce entered into a scheme to avoid payment. He opened numerous stock brokerage accounts and then bought and sold stock, channeling the payments and receipts through a number of different bank accounts. The result was that Pierce was indicted in 1972 on thirteen counts of concealing property subject to a tax assessment in violation of 26 U.S.C. § 7206(4), eight counts of mail fraud in violation of 18 U.S.C. § 1341, and one count of conspiring to do the above acts in violation of 18 U.S.C. § 371. After Pierce pleaded not guilty, the district court granted his motion to quash the 1965 tax assessment, which provided the basis for the thirteen concealment counts, on the ground that it was derived exclusively from illegally seized evidence.

The government then obtained a second indictment in 1973. In place of the concealment counts, Pierce was charged with fourteen counts of using a manipulative and deceptive device in connection with the purchase and sale of securities in violation of 15 U.S.C. § 78j(b) and 17 C.F.R. § 240.10b–5. He then pleaded guilty to the thirteen concealment counts of the 1972 indictment. Pursuant to a plea bargain, the remaining counts were dismissed.

Pierce was sentenced to three years' imprisonment on each count, to run concurrently, and fined $5,000 on each count, to run consecutively, for a total of $65,000. The court suspended execution of the sentence of imprisonment and placed Pierce on five years' probation, subject to certain conditions. One of the conditions, imposed at the suggestion of the government, was that Pierce

> testify under oath before a representative of the United States Attorney's Office . . . on all questions as to his financial condition relating to amounts and locations of all assets.

The district judge also stated that he would consider reducing the fine if Pierce gave testimony concerning his financial condition within two months. Through his attorney, Pierce stated that he had no objection to disclosing his financial situation immediately and that he would notice a motion to modify the fine. Pierce, in response to a direct question from the court, agreed to the terms of the judgment.

However, at the time appointed to carry out the condition of probation, Pierce reversed himself and refused to testify before the United States Attorney as to his financial condition. At the ensuing probation revocation proceeding, Pierce admitted that he had failed to comply with the challenged condition. The district judge revoked probation, implicitly rejecting Pierce's contention that the condition infringed upon his Fifth Amendment privilege against self-incrimination.

II

[1–3] The government contends that Pierce waived his Fifth Amendment privilege with regard to all conditions of probation either by pleading guilty or by accepting the conditions at the sentencing proceeding. Accordingly, it argues, he cannot now attack this condition on Fifth Amendment grounds. We disagree.

A voluntary guilty plea does not waive the right against self-incrimination for all prior activities of the defendant; it waives the privilege only with respect to the crime which is admitted. The defendant retains his privilege as to crimes for which he may still be liable. *United States v. Roberts*, 503 F.2d 598, 600 (9th Cir. 1974), *cert. denied*, 419 U.S. 1113, 95 S.Ct. 791, 42 L.Ed.2d 811 (1975); *United States v. Johnson*, 488 F.2d 1206, 1209–10 (1st Cir. 1973); *see United States v. Romero*, 249 F.2d 371, 375 (2d Cir. 1957); *Burbey v. Burke*, 295 F.Supp. 1045, 1049 (E.D.Wis.1969).[1] Accordingly, Pierce did not waive his Fifth Amendment rights with respect to crimes other than those described in the concealment counts.

1. The cases cited by the government are not to the contrary. Both *Quijada Gaxiola v. United States*, 435 F.2d 264 (9th Cir. 1970), and *Lucero v. United States*, 425 F.2d 172 (10th Cir. 1970), involved a loss of Fifth Amendment rights only with respect to the crime to which the defendant had pleaded guilty, not with respect to other possible crimes.

The government next contends that Pierce's acceptance of probation waived any objection to self-incrimination features of the conditions. However, in *United States v. Consuelo-Gonzalez*, 521 F.2d 259 (9th Cir. 1975) (en banc), we rejected the theory that a probationer voluntarily waives his rights by failing, at the sentencing proceeding, to object properly to the conditions imposed. *Id.* at 265 & n. 15 (plurality); *id* at 274 (Wright, J., dissenting). As a practical matter, a defendant's consent to a probation condition is likely to be nominal where consent is given only to avoid imprisonment. *Id.* at 274 (Wright, J., dissenting). Of course, a truly voluntary waiver would still be effective. *See Lefkowitz v. Turley*, 414 U.S. 70, 80, 94 S.Ct. 316, 38 L.Ed.2d 274 (1973); *Garrity v. New Jersey*, 385 U.S. 493, 499, 87 S.Ct. 616, 17 L.Ed.2d 562 (1967). However, there is no evidence in the record before us to indicate that Pierce understood that he was waiving Fifth Amendment rights by accepting the challenged condition. Thus we do not find merit in either of the government's waiver theories.

III

[4] In *United States v. Consuelo-Gonzalez*, *supra*, 521 F.2d 259, we set out a general test for evaluating probation conditions imposed pursuant to the Federal Probation Act which may impinge upon constitutional freedoms: The conditions must be "reasonably related" to the purposes of the Act. Consideration of three factors is required to determine whether a reasonable relationship exists: (1) the purposes sought to be served by probation; (2) the extent to which constitutional rights enjoyed by law-abiding citizens should be accorded to probationers; and (3) the legitimate needs of law enforcement. 521 F.2d at 262. A balancing approach was articulated so as to facilitate an accommodation between the practical needs of the probation system and the constitutional guarantees of the Bill of Rights. *Id.* at 264–65.

[5–7] In this case, the challenged condition clearly carries out the purposes of the Federal Probation Act—rehabilitation and protection of the public. *Id.* at 263–64. By acquiring information on Pierce's present assets, the court, acting through the probation department, develops a means of detecting illicit investment activities that result in future increases in net worth. Carrying out a program of supervision in this manner is important both in terms of rehabilitation and protection of the public. The possibility of swift detection encourages the defendant to mend his ways. Hopefully this will lead to full rehabilitation. At the same time, strict supervision leads to greater protection of the public by deterring the probationer from further criminal activity.[2] *Id.* at 267; *id.* at 272

2. The written condition of probation, upon which we must judge the alleged violation, clearly supports this interpretation. See text p. 738, *infra*.

It could be argued that the oral statements of the district judge at sentencing demonstrate that the court imposed the disclosure conditions strictly as an aid to its ultimate determination of the fine to be assessed against Pierce. Although the comments of the sentencing judge with regard to a condition subsequently reduced to writing may be helpful in illuminating the purpose of the condition, it is often difficult to ascertain with certainty the intent behind unrehearsed words. It is obvious that misstatements can be made. It is even possible that the sentencing judge may change his mind with regard to the reasons for a condition. For these reasons we appropriately place our primary reliance upon the written text of the condition. Nevertheless the comments of the sentencing judge in this case may properly be interpreted as indicating that the required disclosure had a purpose other than or in addition to the assessment of an appropriate fine. He stated:

> I think *the government is entitled to an examination under oath as to your assets. Beyond that*, I cannot see any need for probation supervision except approval of your residence and approval of your occupation.

(Wright, J., dissenting). Thus the condition serves the purposes of probation. A similar line of reasoning leads us to conclude that the third element of analysis under *Consuelo-Gonzalez*—the condition embraces legitimate needs of law enforcement—has been satisfied.

[8] That brings us to the second *Consuelo-Gonzalez* inquiry. Directing a defendant to release information concerning his financial status may violate his Fifth Amendment right against self-incrimination. Thus, we must evaluate whether the condition imposed involves a proper accommodation between the need for information and those Fifth Amendment rights which Pierce retains. *See id.* at 264–66. That analysis requires consideration of the condition of probation on its face and then as the condition is applied.

[9–13] As regards the condition on its face, we discussed earlier that a defendant who has pleaded guilty to a crime may no longer assert a Fifth Amendment right with respect to that crime. Still, he may raise a Fifth Amendment right with respect to the transaction constituting the crime if he is subject to further liability for that transaction. However, the burden is on the defendant to raise any Fifth Amendment claim he may have with regard to a risk of further prosecution in order to avoid imposition of a disclosure condition. Although the sentencing judge must formulate the condition to avoid the risk of compelled self-incrimination, he cannot take account of Fifth Amendment claims which are not asserted. Thus, where a defendant has pleaded guilty to a crime, a sentencing judge may impose a condition requiring the release of information concerning that crime unless the defendant raises a Fifth Amendment claim that the disclosure could lead to further prosecution.[3]

Nevertheless, a failure to raise the claim at the sentencing proceeding does not effect a waiver of the defendant's Fifth Amendment rights. *See United States v. Consuelo-Gonzalez, supra*, 521 F.2d at 265 & n. 15. Thus, even if the condition as imposed is valid on its face, based on the information presented to the sentencing judge, the defendant may still raise his Fifth Amendment claim in response to questions asked pursuant to the condition. Accordingly, we must also evaluate the condition as applied to determine if there is an infringement upon protected Fifth Amendment rights.[4]

Applying this two-prong analysis to the case before us, we note that the condition imposed by the court required Pierce to "testify under oath before a representative of the United States Attorney's Office for the Central District on all questions as to his financial condition relating to amounts and locations of all assets." The required information was clearly and directly related to the crime to which Pierce had pleaded guilty—concealing property subject to a tax assessment—and Pierce raised no objection at sentencing that release of this information would subject him to further liability.

A fine is warranted, a fine to be determined, however, by whatever your assets disclose.

(Emphasis added.)

Presuming, as we may, that a judge follows the law, such an interpretation is appropriate.

3. A condition which required the probationer to release information concerning past acts unrelated to the crime to which he pleaded guilty would present a different case. However, we need not reach this problem because no such condition was imposed on Pierce.

4. There is one significant difference between evaluating the condition as applied and evaluating the condition on its face: Whereas there is no waiver if the defendant fails to raise his Fifth Amendment claim at the sentencing proceeding, a failure to raise the claim in response to questions asked pursuant to the condition will result in a waiver. When asked to produce information within the scope of the condition, a defendant must either comply or provide justification for failing to do so. If he refuses to assert his Fifth Amendment right and yet refuses to answer questions, the Fifth Amendment right is lost. *See Garner v. United States*, 424 U.S. 648, 654 n. 8, 96 S.Ct. 1178, 47 L.Ed.2d 370 (1976). Where this occurs, probation may properly be revoked, notwithstanding subsequent statements that the defendant had a Fifth Amendment right which he failed to assert.

Indeed, he seemed eager to do so immediately. Thus, we find that the district judge could properly assume that the condition on its face did not require self-incrimination and the condition was valid as imposed.

[14, 15] We turn now to the condition as applied. At the proceeding held pursuant to the condition, Pierce was told that the hearing was being held for the purpose of obtaining under oath a statement of his financial assets and to some extent a statement of his personal history. In response, Pierce, through his attorney, objected to the proposed deposition on Fifth Amendment and other grounds. Upon further questioning as to his intentions, Pierce stated that he would not answer any questions.[5] Whether we can properly evaluate Pierce's Fifth Amendment objection to questioning pursuant to the condition turns on whether the objection was properly raised.

In *Hoffman v. United States*, 341 U.S. 479, 71 S.Ct. 814, 95 L.Ed. 1118 (1951), the Supreme Court enunciated the standard for measuring when a witness may properly claim his right against self-incrimination, and thus refuse to respond to questions:

> To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result. The trial judge in appraising the claim "must be governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence."

Id. at 486–87, 71 S.Ct. at 918.

A proper application of this standard requires that the Fifth Amendment claim be raised in response to specific questions propounded by the investigating body. This permits the reviewing court to determine whether a responsive answer might lead to injurious disclosures. *United States v. Malnik*, 489 F.2d 682, 685 (5th Cir.), *cert. denied*, 419 U.S. 826, 95 S.Ct. 44, 42 L.Ed.2d 50 (1974). Thus a blanket refusal to answer any question is unacceptable. *United States v. Bautista*, 509 F.2d 675, 678 (9th Cir.), *cert. denied*, *Monsivais v. United States*, 421 U.S. 976, 95 S.Ct. 1976, 44 L.Ed.2d 467 (1975); *United States v. Gomez-Rojas*, 507 F.2d 1213, 1219–20 (5th Cir.), *cert. denied*, 423 U.S. 826, 96 S.Ct. 41, 46 L.Ed.2d 42 (1975); *United States v. Theep*, 502 F.2d 797, 798 (9th Cir. 1974); *United States v. Malnik*, *supra*, 489 F.2d at 685. In this regard, we approve the analysis of the Fifth Circuit in *United States v. Malnik*:

> It is simply impossible to anticipate every question that might be asked and conclude that each would present a distinct possibility of self-incrimination if answered by the witness. This is not to say that if [the witness] testifies and produces documents, he may not object to every question. It is just that we cannot speculate and say that any response to all possible questions would or would not tend to incriminate the witness.

489 F.2d at 686. Because Pierce, in his role as a witness, made a blanket refusal to

5. Subsequent to the statements by Pierce's attorney Sherman concerning Pierce's objections to the deposition, Assistant United States Attorney Greenberg, who was conducting the proceeding, sought to clarify Pierce's intentions:

> MR. GREENBERG: Are you telling me that Mr. Pierce will not answer any questions?
>
> MR. SHERMAN: Yes, sir.

After further discussion, Greenberg inquired once again as to Pierce's willingness to comply with the condition:

> MR. GREENBERG: Just so it is absolutely clear, as I understand it then, Mr. Pierce will not answer any questions today, is that correct?
>
> MR. SHERMAN: He is doing so for the reasons that I have stated, yes, Mr. Greenberg.
>
> MR. GREENBERG: And that is your position also, Mr. Pierce?
>
> THE WITNESS: I do what my attorney tells me to do.
>
> MR. GREENBERG: Fine. Well let's terminate this proceeding then and go off the record right now.

As indicated by Greenberg's closing remarks, once it became clear that Pierce would not answer any questions, the hearing was terminated.

answer any questions, we are unable to evaluate his Fifth Amendment claim. Therefore, we need proceed no further in determining the extent of Pierce's Fifth Amendment rights in the circumstances of this case.

Pierce has failed to show that the condition infringed upon his constitutional rights. Nor has he provided any other justification for his refusal to comply with the condition of probation. Thus we hold that the district judge committed no error in revoking probation.

AFFIRMED.

HUFSTEDLER, Circuit Judge, dissenting:

I agree with the majority that Pierce did not waive his Fifth Amendment privilege either by pleading guilty or by accepting probation. I cannot agree that Pierce lost his privilege by the manner in which he raised it, nor can I agree that the condition of probation was valid under the Federal Probation Act (18 U.S.C. § 3651). The majority's contrary conclusions rest on a misreading of the record and the teachings of *Hoffman v. United States* (1951) 341 U.S. 479, 71 S.Ct. 814, 95 L.Ed. 1118 and *United States v. Consuelo-Gonzalez* (9th Cir. en banc 1975) 521 F.2d 259.

The record reveals that the district court imposed the disclosure condition as an aid to its ultimate determination of the amount of the fine that it would assess; the financial examination was not relevant to any future probationary program. The majority opinion's assumptions about the probationary functions of the ordered disclosure [1] are contradicted by the record. The district court first imposed the maximum fine ($65,000), committed Pierce to custody until the fine was paid or otherwise discharged in due course of law, stayed the commitment until March 29, 1974, and ordered Pierce to return to court on that day. The court explained that it "cannot see any need for probation supervision except approval of your residence and approval of your occupation But [a] fine is warranted, a fine to be determined, however, by whatever your assets disclose." The court reminded defense counsel that after the maximum fine has been imposed "at the present time . . . you have 120 days to bring a motion to modify it." Defense counsel promptly made an oral motion to modify the fine, the prosecutor accepted the oral motion, and the court set the hearing on the motion for March 29, 1974.

Pierce appeared thereafter at the United States Attorney's office and was sworn. Upon the advice of his counsel, Pierce refused to give "a statement of [his] financial assets" to the prosecutor on the ground, *inter alia*, that his answers might incriminate him in violation of his Fifth Amendment privilege. The district court formally revoked probation for Pierce's refusal to comply with the challenged probation condition, and committed Pierce to the custody of the Attorney General for three years. Execution of the sentence was stayed pending appeal, first by the district court and then by this court.

The question before us is whether the challenged condition of probation was valid and thus provided a basis for revoking probation when Pierce refused to comply with it, asserting his Fifth Amendment privilege. Applying the reasoning of *United States v. Consuelo-Gonzalez, supra*, 521 F.2d 259, I conclude that the condition was in violation of the Federal Probation Act. In *Consuelo-Gonzalez*, we held that "the terms and conditions of probation . . . must be reasonably related to the purposes of the Act. In determining whether a reasonable relationship exists, we have found it necessary to give consideration to the purposes sought to be served by probation, the extent to which the full constitutional guarantees available to those not under probation should be accorded probationers, and the legitimate needs of law enforcement." (521 F.2d at 262.) This probation condition meets none of these prerequisites.

1. "By acquiring information on Pierce's present assets, the court, acting through the probation department, develops a means of detecting illicit investment activities that result in future increases in net worth. Carrying out a program of supervision in this manner is important both in terms of rehabilitation and protection of the public. The possibility of swift detection encourages the defendant to mend his ways. Hopefully this will lead to full rehabilitation. At the same time, strict supervision leads to greater protection of the public by deterring the probationer from further criminal activity."

The issue presented is narrow: Can the court validly impose a condition of probation that compels a probationer to yield his Fifth Amendment privilege against incrimination and to testify under oath before a prosecutor about his past conduct and his current financial affairs and then revoke probation when the probationer declines to waive his Fifth Amendment privilege and to testify? [2] I think the answer is a firm "no."

The condition was not on its face directed to any probationary goal. The purpose of imposing the condition was not to rehabilitate Pierce, to help the probation department in supervising him, to shield him from future temptation or future wrongdoing, or to aid in an order of restitution. [3] The condition was not imposed to aid law enforcement officers (police) in detecting or deterring future illegal conduct. The district court explicitly and forthrightly explained that the aim was to provide the court with enough financial information to permit it to reevaluate the appropriateness of the maximum fine provisionally imposed when Pierce moved to modify the sentence, *i. e.*, to reduce the fine.

The majority opinion correctly observes that Pierce's guilty plea did not deprive him of his Fifth Amendment privilege in respect of past transactions that could subject him to "further" criminal charges. [4] The Fifth Amendment question is not whether the testimony would have been relevant to prove the concealment counts—of course it would—but whether the same testimony could possibly tend to incriminate Pierce as to other crimes—of course it could. (*E. g., Hoffman v. United States* (1951) 341 U.S. 479, 71 S.Ct. 814, 95 L.Ed. 1118) Pierce's specific concern was his exposure to charges of criminal tax evasion, commonly proved by the net worth method. The compelled testimony would obviously be potentially helpful in making a net worth case.

The majority opinion's conclusion that Pierce did not properly raise his privilege is also unsupported by the record. Pierce appeared before the prosecutor and was sworn. The prosecutor informed him, in accordance with the court's order, that the subject matter of the interrogation was "[the] amounts and locations of all [Pierce's] assets." Pierce then declined to answer, on advice of counsel, based on his Fifth Amendment privilege. There was no "blanket refusal to answer any question" because no "blanket" existed. The prosecutor told Pierce that the purpose of the "hearing" [deposition] was to obtain under oath Pierce's statement "of his financial assets," as ordered by the district court. He did not put his statement in the form of a question, but the substance of the statement was identical. [5] All we have to do is to

2. Very different questions would be posed if, absent the probation condition, the district court denied Pierce's motion to modify the sentence on the ground that Pierce had failed to testify under oath about his financial condition, or, the court, *sua sponte*, or on the prosecutor's motion, had set aside its order staying execution of sentence because Pierce had failed to or declined to provide the court with the same sworn testimony.

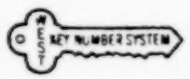
3. Although the court might have validly conditioned probation on restitution of tax liability, *United States v. Weber* (7th Cir. 1971) 437 F.2d 1218; 18 U.S.C. § 3651, it did not do so here, perhaps because of the necessity of a civil tax proceeding to first determine liability. (*United States v. White* (2d Cir. 1969) 417 F.2d 89; *United States v. Taylor* (4th Cir. 1962) 305 F.2d 183.)

4. "The defendant retains his privilege as to crimes for which he may still be liable." (Majority op'n, 561 F.2d 735 at 738.)

5. The majority's reference to *United States v. Malnik* (5th Cir. 1974) 489 F.2d 682, and to the other cases cited is inappropriate. All of them involve some kind of blanket refusal to testify at all or to testify about unspecified subjects. To defeat a claim of privilege where there has been no vague, blanket refusal, it is incumbent upon the Government "to establish with perfect clarity that the response would not possibly have a tendency to incriminate." (McCormick's Handbook of the Law of Evidence § 139

ask whether Pierce's revelation of his assets might have incriminated him. The question is answered simply: "Yes." As *Hoffman v. United States* (1951) 341 U.S. 479, 71 S.Ct. 814, 95 L.Ed. 1118, observed: The claim of privilege must be sustained unless it is "'*perfectly clear*, from a careful consideration of all the circumstances in the case, . . . that the answer[s] *cannot possibly* have such tendency' to incriminate." (341 U.S. at 488, 71 S.Ct. at 819 (*quoting Temple v. Commonwealth* (1881) 75 Va. 892, 898 (emphasis in original).)) In *Hoffman*, the lower court was reversed because it failed to take into consideration information outside the record that the chief occupation of some individuals involves evasion of federal criminal laws. *Pierce* presents an even stronger case because no facts outside the record need be noted.

Because I would invalidate the probation condition because it is irrelevant to the purposes of the Federal probation Act, I do not reach any constitutional issue.[6] I would vacate the order revoking probation, vacate the challenged probation condition, and remand the case to the district court for further proceedings consistent with the views herein expressed.



(E. Cleary ed. 1972). *Cf. United States v. Theep* (9th Cir. 1974) 502 F.2d 797, 799 ("It does not appear that [the IRS agent] made the specific inquiries required to afford the appellants the opportunity to make [the] appropriate objection . . . .").)

6. Assuming *arguendo* that the condition here passes statutory muster, the constitutional question is whether as a result of validly invoking his right to remain silent, the consequence of probation revocation might be imposed. (*See Lefkowitz v. Turley* (1973) 414 U.S. 70, 77, 94 S.Ct. 316, 322, 38 L.Ed.2d 274 ("The Amendment not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.").)

The relevant precedent on this issue includes cases such as *Garrity v. New Jersey* (1967) 385 U.S. 493, 87 S.Ct. 616, 17 L.Ed.2d 562 (revocation of public employment after assertion of privilege); *Spevack v. Klein* (1967) 385 U.S. 511, 87 S.Ct. 625, 17 L.Ed.2d 574 (disbarment); *Gardner v. Broderick* (1968) 392 U.S. 273, 88 S.Ct. 1913, 20 L.Ed.2d 1082 (revocation of public employment); *Sanitation Men v. Sanitation Comm'r* (1968) 392 U.S. 280, 88 S.Ct. 1917, 20 L.Ed.2d 1089 (revocation of public employment); and *Lefkowitz v. Turley* (1973) 414 U.S. 70, 94 S.Ct. 316, 38 L.Ed.2d 274 (revocation of public contracting privileges).

Nancy HUNT, Plaintiff-Appellant,

v.

SUN VALLEY COMPANY, INC., and Frank McMasters, Defendants-Appellees.

No. 75-1433.

United States Court of Appeals, Ninth Circuit.

Sept. 19, 1977.

A personal injury action arose out of a ski lift accident, and a jury in the United States District Court for the District of Idaho, J. Blaine Anderson, J., found against the plaintiff. She appealed. The Court of Appeals held that: (1) under Idaho law applicable, the ski lift was not a common carrier; (2) circumstances were not such as to make the rescue doctrine applicable, and (3) no error was shown in the instructions given.

Affirmed.

1. Federal Courts ⇐785

Court of Appeals accords substantial deference to district court in its defining and applying law of state in which court is sitting in diversity cases.

2. Carriers ⇐321(1)

In action for injuries sustained in a ski lift accident, term "common carrier" would not have meant anything to jury, and ab-

BEST COPY AVAILABLE

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

F I L E D
OCT 17 1977
EMIL E. MELFI, JR.
Clerk, U.S. Court of Appeals

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. EDWIN PIERCE, Defendant-Appellant.	)	No. 74-1532 O R D E R

Before: HUFSTEDLER and WALLACE, Circuit Judges, and FREY,* District Judge

Appellant's Application for Permission to File Petition for Rehearing in Excess of Ten Pages is granted and the Petition is ordered filed.

The Petition for Rehearing is denied; Judge Hufstedler would grant the petition.

---

*Honorable William C. Frey, United States District Judge, District of Arizona, sitting by designation.